IN THE HIGH COURT OF FIJI

AT SUVA

APPELLATE JURISDICTION

Criminal Appeal No. HAA 17 of 2014

BETWEEN	:	**VILIAME GAUNA**
		Appellant
AND	:	**STATE**
		Respondent
BEFORE	:	**HON. MR. JUSTICE PAUL MADIGAN**
Counsel	:	Appellant in person Ms. J. Fatiaki for the State
Date of hearing	:	11 August and 19 September 2014
Date of Judgment	:	20 October 2014

JUDGMENT

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1. On the 23rd May 2014 the appellant was convicted of one count of robbery with violence and acquitted of one count of damaging property in the course of that robbery. On the same day he was sentenced to a term of 4 years imprisonment for the robbery a term that was to run concurrently with terms he was already serving.

2. The appellant now appeals that conviction on the grounds that the Magistrate did not deal appropriately with the identification by the complainant; that she didn't give reasons for not believing his alibi, and that he was prejudiced by not being represented in the proceedings.

3. In written submissions placed before the Court, the appellant withdrew the alibi and representation grounds and proceeds solely on the issue of identification.

4. He further raised several irregularity of charge issues when appearing at the hearing of the appeal.

5. The facts of the case were that on the 13th December 2008, the complainant, a Mr. Cakau, was working overnight as a security officer at a petrol station in Raiwaqa. He says that at the time (time not stated) he was in the front of the station and looking towards the roadside when he saw the appellant ("the accused") approaching with several others. The lights were on and he could identify him. The accused was holding a knife in his hand. He said he went to an identification parade and identified the accused. His evidence stopped there.

6. The learned Magistrate in her written judgment giving reasons for the conviction on the robbery charge quite correctly analyses the identification evidence. The complainant was quite adamant that the person he saw approaching was the same person that he identified in the identification parade (the accused). She carefully examines the identification using the **Turnbull** guidelines; she finds that it was not a fleeting glance and she is satisfied that it was safe to accept the identification.

7. This Court has no hesitation in finding that the grounds of appeal relating to identification have no merit and they fail.

8. However, the matter does not stop there.

9. The record reveals that the prosecution conducted this prosecution relentlessly and persistently between 28th February 2011 until the 26th May 2014. It is also revealed that within that period the prosecution was not ready to proceed to hearing on at least **12** occasions with the accused protesting each time that his case was not being advanced.

10. But the most perturbing aspect of this case which took over three years is that **there is no evidence of robbery** from any of the witnesses.

11. The complainant security guard when giving evidence speaks of the approach of men to the petrol station but the prosecutor takes him no further than that. PW1 a police officer who gives identification evidence from having seen on CTV video of the approach of the boys gives **hearsay** evidence that "some Fijian boys came to rob the bowser" and speaks of going to the scene and seeing broken glass everywhere. He says nothing about a robbery from his own knowledge. He even says that the CTV video that identifies the accused was destroyed by mistake.

12. Evidence of the robbery was presumably contained in statements that the prosecution tendered in evidence against the objections of the accused at the time. The record does not show that the Magistrate dealt with this issue in a judicial way before she acceded to the prosecution motion to accept the statements in evidence.

13. Even worse, the accused had told a Magistrate earlier that his interview under caution was disputed and he objected to its production. Nevertheless this Magistrate did not deal with that issue but just accepted it into evidence.

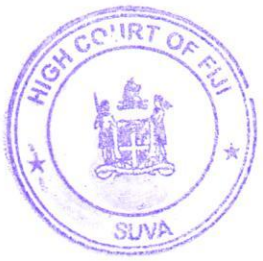
14. I don't think this Court has even seen a trial below that has been as badly handled as this. Even the complainant/victim gives no evidence about the robbery and the prosecution have been allowed every one of its applications over 3 years to the prejudice of the accused.

15. In her reasons for conviction, the Magistrate takes facts of the robbery she says from the Summary of Facts. A summary of facts may well be relevant on a plea of guilty but in a trial, judgment must be given on the evidence heard in Court and there is no evidence of robbery. She says at paragraph 52 of her judgment "I have carefully perused the evidence presented by the prosecution". If she had she would have realized that there was glaring lacuna in the evidence.

16. The trial has been in breach of sections 14(2)(a), 14(2)(l) and 15(i) of the Constitution. It is his right to have had a fair trial and quite obviously he hasn't.

17. The conviction for robbery is quashed and the sentence set aside.

18. The appellant is serving a sentence for another crime and is therefore to be returned to custody.



P.K. Madigan
Judge

At Suva
20 October 2014